IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 83, Original

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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BRIEF IN OPPOSITION TO MOTION TO DISMISS

STATEMENT

Rather than respond to the plaintiff states' motion for judgment on the pleadings with the customary brief in opposition,[1] Louisiana has filed a motion to dismiss

[1] While the defendant's current filing is also styled as a brief in opposition to the motion for judgment on the pleadings, it seeks a second bite of the apple by stating that "if the Court disagrees with [the] suggestion [that "facts must be developed before a Special Master"] and determines that the constitutional questions are ready for consideration at this time, the State of Louisiana respectfully requests an opportunity to brief and orally argue those questions fully." Brief in Support of Motion to Dismiss, at 6. The plaintiff states do not oppose oral argument if it would be helpful to the Court in ruling on the motion for judgment on the pleadings; however, they do object to the defendant's request for an opportunity to file a second brief in opposition to the

that merely restates arguments made previously in its brief opposing the plaintiff states' motion for leave to file the complaint.[2] Similarly, all that the defendant does in its supporting brief is reiterate and embellish, with new counsel, its prior contentions (1) that the plaintiff states, because they do not bear the legal incidence of the Louisiana First Use Tax, lack standing to pursue this action in this Court; and (2) that "pending" Louisiana state court proceedings present an appropriate forum for the vindication of the plaintiffs' rights. In its effort to delay the ultimate resolution of this case, the defendant simply ignores the fact that these issues were fully aired in the plaintiff states' brief supporting their motion for leave to file the complaint (at 12-18) and the amici curiae brief of the United States and the FERC (at 8-14), raised in Louisiana's brief in opposition to the plaintiff states' motion for leave to file the complaint (at 7-18), and rejected by this Court when it assumed jurisdiction by its order of June 18, 1979.

Before this Court granted the plaintiff states' motion for leave to file the complaint, for example, it was told:

> It is probable that in the near future other actions challenging the validity of the First Use Tax will be filed in the Louisiana courts by interstate gas pipelines suing for recovery of amounts of the tax paid under protest. La. Rev. Stat. Ann. § 47:1576 (West). The [Federal Energy Regulatory] Commission has authorized interstate

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motion for judgment on the pleadings because of the further delay that would be occasioned by allowing Louisiana another brief on the questions raised by the motion. *See* footnotes 8 & 9, *infra*.

[2] Louisiana waited five weeks after the filing of the plaintiff states' motion for judgment on the pleadings to respond with a motion to dismiss. The current motion of the defendant was filed almost five months after its brief in opposition to the motion for leave to file the complaint and more than two months after Louisiana responded to the merits of the complaint by filing its answer.

> pipelines to pass on in their rates the additional costs for natural gas which the pipelines incur as a result of the Louisiana First Use Tax. As a condition to this authorization, however, the pipelines are required to take all legal actions available to them to determine the constitutionality of the tax.

Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae, at 7. The only thing new presented by the defendant is its report that the understandable prognostication of tax refund litigation has come true.

For the reasons discussed below, the plaintiff states maintain that the defendant's recurring standing argument, the tax refund litigation, and the actions pending when the plaintiff states filed their motion for leave to file the complaint are all insufficient to lead this Court to divest itself of jurisdiction in this case.[3]

ARGUMENT

I.

LOUSIANA HAS OFFERED NO VALID BASIS FOR THIS COURT TO REVERSE ITS DECISION ACKNOWLEDGING THE STANDING OF THE PLAINTIFF STATES.

On June 18, 1979, this Court acknowledged its exclusive jurisdiction over this original proceeding by granting the plaintiff states leave to file their complaint challenging the Louisiana First Use Tax on multiple constitutional grounds. By its order of June 18 the Court acted in the face of Louisiana's brief in opposition, filed May 29, which urged (at 7-18) that the plaintiff states lacked standing.

Now, in a motion to dismiss, Louisiana has reasserted the already rejected position that because the

[3] In this brief, the plaintiff states also respond to the defendant's renewed assertion that certain facts must be developed before a master before the Court considers the questions raised by the plaintiffs' motion for judgment on the pleadings.

legal incidence of the First Use Tax falls on pipeline companies that transmit the gas, these companies are the real parties in interest and the interest of the plaintiff states is too remote to give them standing to maintain this action. Louisiana argues that this conclusion is demonstrated because these companies have since sought to intervene in this proceeding. Motion to Dismiss, at 2. However, the pipeline companies' attempt to intervene *proves* nothing. In *Utah v. United States,* 394 U.S. 89, 92 (1969), for example, this Court suggested that if a private party has a substantial basis for intervening in an original action, intervention may be permissible. Thus, it is ironic that Louisiana maintains that the pipeline companies are the real parties in interest in this case yet denies that they have a right to intervene. Brief in Opposition to Motion for Leave to Intervene, at 3.

In its current brief, Louisiana likewise continues to distort the status of this case and the relevant issues. For instance, the defendant asserts that the pipeline companies seek "to replace" the plaintiff states as the real parties in interest. Brief in Support of Motion to Dismiss, at 11. In reality, as the Court recognized by granting the motion for leave to file the complaint, it is the mammoth economic burden directly imposed by the First Use Tax on the plaintiff states and their economies that gives the plaintiff states standing to bring this suit. *Pennsylvania v. West Virginia,* 262 U.S. 553, 591-92 (1923).[4] Under these circumstances, it

[4] The defendant again misleads the Court with its claim that the plaintiff states have failed to allege that "Louisiana has played [any] part in . . . transferring to . . . [out-of-state] consumers the cost of the tax assessed on the pipeline companies." Brief in Support of Motion to Dismiss, at 12. As the plaintiff states' brief supporting the motion for judgment on the pleadings repeatedly contends, the unique features of the Louisiana First Use Tax force interstate consumers, including the plaintiff states as users of natural gas for

cannot seriously be contended that the plaintiff states are a stand-in or volunteer for the interests of the pipeline companies. *Cf. Oklahoma v. Atchison, Topeka & Santa Fe Railroad,* 220 U.S. 277, 289 (1911).[5]

Undeniably, Louisiana, by levying its First Use Tax, is causing serious injury to the plaintiff states and to the well-being of their economies. Indeed, the tax threatens the viability of gas-consuming industries and harms the economic prosperity of entire regions of the country. Moreover, the gas consuming states have a vital interest in the unimpeded flow of federally regulated natural gas in interstate commerce. The Louisiana tax interferes with this flow and subjects the gas to confiscation as contraband should the tax not be reported or paid. La. Rev. Stat. Ann. § 47:1306B (West Supp. 1979).

> This interference gives rise to a matter of grave public concern in which the state, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest, but one which is immediate and recognized by law.

Pennsylvania v. West Virginia, 262 U.S. 553, 592 (1923). Thus, this Court properly concluded in deciding to exercise its original jurisdiction that the interests of the plaintiff states are sufficient to support their standing

governmental purposes, to bear the burden of the tax in the form of higher prices. Brief in Support of Motion for Judgment on the Pleadings, at 9-10, 12, 20-21, 28.

[5] Although Louisiana has cited the *Santa Fe* case for the proposition that the states cannot litigate the tax claims of private parties, Brief in Support of Motion to Dismiss, at 13, this Court has emphasized that the *Santa Fe* case simply bars the state from volunteering as a nominal plaintiff for private grievants. Georgia v. Pennsylvania R.R., 324 U.S. 439, 447 (1945).

in this case. *Georgia v. Pennsylvania Railroad,* 324 U.S. 439, 447 (1945).[6]

Finally, Louisiana has itself effectively recognized the standing of the plaintiff states to bring this action by conceding that the plaintiff states might properly intervene in its courts in the pending proceeding concerning the constitutionality of the tax. Motion to Dismiss, at 3 and Brief in Support of Motion to Dismiss, at 19-20.

For all these reasons, this Court should not reverse its decision acknowledging the standing of the plaintiff states to bring this suit, and the defendant's motion to dismiss should be denied.

II.

NO LOUISIANA COURT IS AN APPROPRIATE OR ADEQUATE FORUM FOR THE PLAINTIFF STATES TO LITIGATE THEIR CLAIMS.

In determining whether this case was appropriate for the exercise of its original jurisdiction, this Court not only gauged the seriousness and dignity of the plaintiff states' claims but also considered the availability of other forums where there might be jurisdiction over the named parties, where the issues tendered might be litigated, and where appropriate relief might be had. *See Arizona v. New Mexico,* 425 U.S. 794, 796-97 (1976).

In its brief in support of its motion to dismiss (at 16), Louisiana, without argument, reiterates its claim that a declaratory judgment proceeding it instituted in a

[6] Moreover, in determining whether a state is the real party in interest in a matter, this Court has said that it will look beyond legal forms to the substance of the claim. Arkansas v. Texas, 346 U.S. 368, 371 (1953). Thus, the fact that the legal liability for the tax falls on the pipeline companies does not undermine this Court's finding that the plaintiff states have an interest that permits them to litigate the constitutionality of the First Use Tax in this Court.

Louisiana state court before this Court exercised its original jurisdiction, in which the plaintiff states are not parties, requires this Court to stay its hand. Enough has been said already on the inadequacy and inappropriateness of that forum. Brief in Support of Motion for Leave to File Complaint, at 15-16; Brief for United States and the Federal Energy Regulatory Commission as Amici Curiae, at 12-13.

Louisiana also asks this Court to dismiss this action because the pipeline companies filed a tax refund suit in a Louisiana state court after the filing of the plaintiffs' motion for leave to file complaint and this Court's decision to exercise its original jurisdiction. This request makes light of this Court's exercise of jurisdiction. It also ignores that whatever state court proceedings occur after this Court's exercise of its original jurisdiction are irrelevant to the conduct and disposition of this case. *Cf. Steffel v. Thompson,* 415 U.S. 452, 462 (1974) (abstention unnecessary in absence of pending state proceedings); *Ex Parte Young,* 209 U.S. 123, 161-62 (1908) ("When such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject-matter of inquiry in a suit already pending in a Federal court, the latter court, *having first obtained jurisdiction over the subject-matter,* has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed.") (emphasis added).

More than the time sequence undermines the defendant's argument. The pipeline companies' tax refund suit, mandated by the orders of the FERC, presents a wholly inappropriate and inadequate forum for the vindication of the constitutional claims pressed by the plaintiff states. As pointed out by the United States and the FERC before this Court assumed jurisdiction in this

case, the First Use Tax refund suit mechanism established by Louisiana permits neither injunctive nor declaratory relief against collection of the tax. Brief for United States and the Federal Energy Regulatory Commission as Amici Curaie, at 7.[7] Without such relief, which only this Court may grant, Louisiana will continue to collect millions of dollars in taxes,[8] perhaps for years, at the expense of the plaintiff states as consumers of natural gas and to the irreparable injury to their quasi-sovereign interests in protecting their economies from the enormous impact of the First Use Tax.

Finally, although Louisiana maintains without illustration that this case involves a complicated state tax statute that is uncertain as to meaning and the constitutional issues its raises, several bright lights pierce the defendant's smoke screen. It is apparent on the face of the First Use Tax that this statute effectively imposes a tax on all natural gas that passes through Louisiana from the federal domain to the plaintiff

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[7] Declaratory and injunctive relief are prayed for by the plaintiff states. *See* Complaint, at 27. On the other hand, the pipeline companies' tax refund suit, even if eventually successful, is at best a step removed from the only possible relief it may promise for the plaintiff states, *viz.*, refunds, a remedy this Court has deemed inadequate in the past. FPC v. Tennessee Gas Transmission Co., 371 U.S. 145, 154-55 (1962).

[8] Louisiana may also derive substantial economic benefit at the expense of the plaintiff states simply by prolonging this proceeding, since its present interest rate on refunds is only six per cent per annum. La. Rev. Stat. § 47:1576(A) (West Supp. 1979). As Louisiana State Representative Wilbert J. Tauzin, II, one of the defendant's counsel of record in this Court, has stated:

> So that the total amount that we might be liable for in the event that we should lose the litigation is available for refund of 6% interest. We are likely to make more than 6% interest on it in investments. We are actually going to probably come out a little bit ahead on it.

44 Fed. Reg. 46,293 (Aug. 7, 1979) (footnote omitted).

states; that this tax is, in effect, a local tariff; and that it raises the clearest and most fundamental constitutional issues concerning the relation of the states within the federal union.

If this Court divests itself of its exclusive jurisdiction over this matter, the only other available forum for deciding these fundamental issues is a court of the defendant state. Requiring resort to a Louisiana court, however, would run counter to the rationale for the Court's original jurisdiction over cases involving the states. As this Court has noted, "no State should be compelled to resort to the tribunals of other States for redress, since parochial factors might often lead to the appearance, if not the reality, of partiality to one's own." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 500 (1971). As between the courts of the defendant state and this Court, the only suitable forum for deciding the clear and fundamental issues raised in this case is this Court.

The defendant failed at the outset to demonstrate any considerations of convenience, efficiency, or justice that warranted this Court's denial of the plaintiffs' motion for leave to file their compaint. *Massachusetts v. Missouri,* 308 U.S. 1, 19 (1939). The current motion to dismiss does not present any new or unforeseen consideration that suggests this Court erred in its original decision. Indeed, the plaintiff states have amply demonstrated the contrary — that the interests of convenience, efficiency, and justice are best served by this Court's continued assertion of its jurisdiction over this matter. For these additional reasons, the defendant's motion to dismiss should be denied.

III.

NO ADDITIONAL FACTS ARE NECESSARY FOR THIS COURT TO DECIDE PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS.

With simplistic and irrelevant charts, together with distortions of the purposes and operation of the First Use Tax, Louisiana attempts to obscure the obvious point that no facts are needed to resolve the supremacy and commerce clause issues pressed by the plaintiff states' motion for judgment on the pleadings. Brief in Support of Motion for Judgment on the Pleadings, at 39-41. For example, no matter how often Louisiana attempts to justify the relevance of the alleged instate processing of natural gas, this "fact," even if it were proved, would have no bearing on whether federal law precludes imposition of the tax or whether the tax discriminates on its face against interstate commerce.

Moreover, from reading the defendant's brief in support of its motion to dismiss, one would think that the First Use Tax was a tax only on instate processing of natural gas. However, the taxable events under the Louisiana statute are infinitely more nebulous: any "transportation in the state of unprocessed natural gas," any "transfer of possession or relinquishment of control," or any "other acertainable action" triggers the tax. La. Rev. Stat. § 47:1302(8) (West Supp. 1979). The tax is imposed on the total volume of gas and is not apportioned to any particular use. La. Rev. Stat. § 47:1303B (West Supp. 1979). Thus, decisions of this Court accurately characterize the imposition of the First Use Tax on Louisiana's self-styled "uses" as an unconstitutional tax on the interstate transportation of the gas itself. *See Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 157 (1954); *East Ohio Gas Co. v. Tax Commission of Ohio,* 283 U.S. 465 (1931).

The defendant's renewed plea that this case be referred to a special master to determine "constitutional facts" already admitted by Louisiana in its answer, decided by this Court, or subject to its judicial notice, is essentially another attempt to deny the plaintiff states speedy and efficient relief and to keep flowing to Louisiana the enormous, ever increasing revenues generated by the First Use Tax.[9] The plaintiff states, as they have urged in both their motion for judgment on the pleadings and their answer to the motion for the appointment of a special master, submit that this case is now in an appropriate posture for resolution. The issues raised by the motion of the plaintiff states are purely legal and thus appropriately should be decided on the basis of the pleadings. *See, e.g., Douglas v. Seacoast Products, Inc.,* 431 U.S. 265, 271-72 (1977); *Philadelphia v. New Jersey,* 430 U.S. 141 (1977); *United States v. Louisiana,* 363 U.S. 1 (1960) (all indicating that the determination of a supremacy clause issue presents a purely legal question); *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977) (finding a commerce clause violation without a record). *See also* Brief in Support of Motion for Judgment on the Pleadings, at 39-41.

CONCLUSION

For all of the above reasons, and to prevent mammoth economic loss to the plaintiff states and their economies, the defendant's motion to dismiss should be denied, and this Court, without appointing a special

[9] Louisiana's motive for seeking delay, it is submitted, is more pecuniary than philosophical. *See* footnote 8, *supra.*

master, should act expeditiously on the motion of the plaintiff states for judgment on the pleadings.

Respectfully submitted,

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